IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4143 OF 1991

Shri Hushen Yakub Bagwan & ors. .. Petitioners

versus

Shri Dattatraya Kashinath Rajmane.. Respondent

...

Mr.M.L. Patil for the petitioner.

CORAM : D.G. KARNIK, J

DATED : 23rd July 2004.

P.C:-

1. By this petition, the petitioners challenge the judgement and order dated 12th July 1991 passed by the learned VIth Additional District Judge, Solapur dismissing the appeal and confirming the decree for possession passed by the learned Civil Judge, Junior Division, Karmala.

2. The relevant facts are given below:

The respondent is an owner and landlord of the property bearing municipal house no.1424 situate at Karmala. The petitioner no.1 is a tenant in respect of the shop premises admeasuring 8′ x 15′ situate in the property bearing municipal house no.1424. The petitioner nos.2 and 3 are the brothers of the petitioner no.1 but are alleged to be his sub tenants. The respondent als owns an adjoining property bearing municipal house no.1425. The respondent possesses an area admeasuring about 6′ x 25′ in the adjoining property where he runs a cloth shop. The respondent has two sons. One son is temporarily working in a Bank. The petitioner filed a suit against the respondent on the ground that he requires the suit premises reasonably and bonafide for his business. He pleaded that the existing shop premises of 6′ x 25′ was insufficient for his business and his sons were insisting on him to renovate the shop with better frontage. He further pleaded that he wanted possession of the suit premises so that by combining the suit premises with

his existing shop he could have a bigger shop with a better frontage of about 14 feet. The respondent also alleged that the petitioner no.1 alone was a tenant in the suit premises and had sublet the suit premises to respondent nos.2 and 3. The suit premises were let out only for the purpose of running a cycle shop. The petitioner nos.2 and 3 were using the suit premises for the purpose of pan shop and had thus changed of the user of the suit premises. The respondent also alleged that the petitioners by demolishing a part of the wall of the suit premises and had fixed a wooden grill partition and had thus made permanent alterations and caused damage to the suit property.

3. The petitioners appeared and resisted the suit. They denied that petitioner nos.2 and 3 were the sub tenants and contended that petitioners formed a joint family. They denied having made any alterations and or having changed the user of the premises. They also denied that the respondent required the suit premises reasonably and bonafide.

4. The trial Court after considering the evidence of the parties decreed the respondent’s suit

on all grounds. viz. subletting, permanent construction, change of user and reasonable and bonafide requirement. The appellate Court confirmed the decree for possession on all grounds by its judgement dated 12th July 1991. That judgement is impugned in this petition.

5. The suit premises were originally let out to Yakub, father of the petitioners. All the three petitioners are the sons of Yakub. After the death of Yakub all the three sons, submits learned counsel for the petitioners, became the tenants and the Courts below erred in holding that petitioner no.1 alone was the tenant and petitioner nos.2 and 3 were the sub-tenants. Though Yakub was the original tenant, in his life time itself, the rent receipt was transferred in the name of petitioner no.1. At the time of the transfer of rent receipt, a rent agreement was executed between the respondent and the petitioner no.1, which was also signed by Yakub as an attesting witness. This clearly indicates that original tenancy of Yakub was surrendered by him or in any event transferred to the petitioner no.1 with his consent in the life time of Yakub. Thus, the petitioner alone was the tenant and petitioner nos.2

and 3 were not the tenants. The finding reached by the appellate Court that the Yakub surrendered the tenancy and petitioner became a fresh tenant under a rent note Exhibit-121 with the consent of his father Yakub is proper & correct. The appellate Court has also held that petitioner no.3 was running pan shop in the suit premises on the date of the suit. The finding is supported by evidence on record. The Shop Act licence of the pan shop in the suit premises stands in the name of petitioner no.3. Once the presence of petitioner no.3 on the suit premises was proved and it was further proved that it was petitioner no.3 who was running the pan shop in the suit premises, the burden of proving in what capaciy he was doing so was on the petitioners. The only case of the petitioners was that petitioner nos.1, 2 and 3 were members of Joint Hindu Family (for short JHF) and the petitioner no.3 was running a business as a member of the JHF, has to be rejected as the petitioners are not Hindus and do not form a JHF. Therefore, the finding recorded by the Courts below that the petitioner no.3 was a sub-tenant of petitioner no.1 is proper and possible.

6. The learned counsel for the petitioner

contends that erecting of a small wooden frame and/or partition does not amount to making of a permanent structure and cannot also be construed as causing damage to the suit property. The Courts below have held that for the purpose of fixing of a partition and fixing of a wooden frame, wall of about 2 1/2 feet width was demolished by the petitioners. Hence, this is not a case of mere fixing of a wooden partition but of a demolition of a wall of 2 1/2 feet in length. The Courts below have held that this caused damage to the suit property. I see no reason to interfere in the said finding of fact.

7. The learned counsel for the petitioners submits that the respondent also owns a shop in the neighbouring premises and the suit shop is admeasuring only 6’ x 25’ with a frontage of only 6’. The respondent runs a cloth business in the suit premises. The respondent has two grown up sons. One son is temporarily employed in a Bank. The respondent’s sons wants to join the respondent in the cloth business. There is no place for accommodating the sons in the existing shop which has a width of only 6 feet. The Courts below have held that taking into consideration the nature of the cloth business

and modern trends therein, it is necessary to have a shop with wider frontage and 6 feet frontage is not enough for running a shop profitably. The view taken by the appellate Court is a possible view and needs no interference.

8. The appellate Court has also held that the petitioner no.1 who was the tenant was not doing business in the suit premises and, therefore, no hardship would be caused to him. The petitioner no.3 is a sub-tenant and therefore, it is not necessary to consider his hardship. As the petitioner no.1 is not doing business in the suit premises obviously no hardship would be caused to him and the hardship likely to be caused to the respondents would be greater.

9. For these reasons, I do not find any error in the concurrent finding of fact recorded by the Courts below.

10. Petition is therefore, dismissed with costs. Rule discharged with costs.

D.G. KARNIK, J